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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO TAPIA,

Defendant and Appellant.

E069138

(Super.Ct.No. FVI1502456)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Adrienne S. Denault, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

In December 2015, pursuant to a negotiated agreement, defendant and appellant Alfonso Tapia pleaded guilty to resisting an executive officer (Pen. Code, § 69).<sup>1</sup> He also admitted that he had suffered one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and four prior prison terms (§ 667.5, subd. (b)). In return, the court sentenced defendant to a total term of 10 years in state prison, but stayed execution of the sentence to allow defendant to fulfill his obligations as a confidential informant after he signed a cooperation agreement with the San Bernardino County District Attorney's Office (District Attorney) in conjunction with his guilty plea. Under the terms of the cooperation agreement, defendant agreed to provide information that would lead to the initiation of eight criminal cases. Upon defendant's compliance with the terms of the cooperation agreement, the District Attorney agreed to permit defendant to withdraw his guilty plea and enter a new plea to the substantive offense only with no prior strike or prior prison term enhancements. The court would then resentence defendant to time served.

According to the District Attorney and law enforcement, defendant failed to take his responsibilities under the cooperation agreement seriously, and the prosecutor moved to have the stay on the previously imposed sentence lifted. In addition, defendant moved to withdraw his guilty plea, arguing that he had complied with the terms of the

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

cooperation agreement. Following a hearing, the trial court found that defendant had failed to abide by the terms of the cooperation agreement and denied defendant's motion to withdraw his guilty plea. The court then lifted the stay on the execution of judgment, and sentenced defendant to 10 years in state prison with 257 days of credit for time served.

On appeal, defendant argues that this court should reverse the trial court's order and either specifically enforce the plea agreement or permit him to withdraw his guilty plea and admissions, because the cooperation agreement was illusory, a product of mistake, or otherwise unenforceable. In the alternative, defendant claims that he had performed his obligation under the cooperation agreement. The People respond that the appeal should be dismissed because defendant failed to secure a certificate of probable cause. In the alternative, the People assert that defendant's claims are meritless because the trial court entertained defendant's motion to withdraw his plea and concluded from the evidence that defendant had failed to perform under the terms of the cooperation agreement he entered into with the District Attorney. For the reasons explained below, we affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Defendant's Criminal Background and Access to Gang Information*<sup>2</sup>

Defendant has a criminal past, including convictions for theft, burglary, and drug use. As a result, defendant had been incarcerated on several occasions, during which he befriended persons involved with the “Mexican Mafia.”

In 2007, when defendant became eligible for parole, he moved from Los Angeles to Hesperia, rented a home, and began working as a home repair contractor. Defendant's neighborhood included members of a gang called “Thee Rascals” (Rascals), who approached and talked to defendant about their criminal activities, such as manufacturing and selling crystal methamphetamine, cultivating and selling marijuana, and gathering and possessing weapons. During those conversations, gang members told defendant about their operation and locations, and how they collected and distributed money, including the post office boxes to which the money from drug sales and “shakedown” schemes was sent.

#### B. *Underlying Offense*<sup>3</sup>

On October 2, 2015, police responded to defendant's residence in reference to a domestic disturbance call involving defendant and his wife. Defendant was

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<sup>2</sup> The details of defendant's criminal background and access to gang information are taken from defendant's declaration in support of his motion to withdraw his guilty plea.

<sup>3</sup> The details of the underlying offense are taken from the police report.

uncooperative, refused to follow officers' verbal commands, and physically resisted the officers. Defendant also threatened to harm an officer and made vulgar statements to the officers.

C. *Procedural Background*

On December 7, 2015, a first amended felony complaint was filed charging defendant with one count of resisting an executive officer (§ 69). The first amended complaint further alleged that defendant had sustained one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and four prior prison terms (§ 667.5, subd. (b)).

On December 17, 2015, as part of a negotiated disposition, defendant pleaded guilty to resisting an executive officer and admitted the prior enhancement allegations. In exchange, defendant received a suspended sentence of 10 years. In conjunction with his guilty plea, defendant entered into a cooperation agreement with the District Attorney wherein he agreed that if he complied with the terms of that agreement, the prosecutor would permit him to withdraw his guilty plea, enter a new guilty plea to only the substantive offense of resisting an executive officer, and be resentenced to time served. As part of his plea, defendant also agreed that if he violated any terms of the plea agreement, he would not be permitted to withdraw his guilty plea. At the plea hearing, the trial court twice emphasized that the cooperation agreement defendant entered into with the District Attorney explicitly provided that if defendant failed to perform under the terms of the agreement, he would be barred from withdrawing his plea. Defendant

acknowledged he understood the terms and confirmed his intent to plead guilty pursuant to the negotiated plea agreement.

In addition, the trial court went through the plea form thoroughly with defendant, asking him if he understood his constitutional rights, whether his counsel had completely explained his legal and constitutional rights to him, and whether he waived his constitutional rights. Defendant acknowledged that he had placed his initials on the change of plea form indicating he understood his rights and consequences of the plea, that he did not need any more time to speak with his attorney, and that he wished to waive his constitutional rights in order to plead guilty. Defense counsel confirmed that he had personally read and explained the terms to defendant, had adequate time to discuss any issues with him, and was satisfied that he understood. The court further advised defendant of the penal consequences of his plea and admission. Defendant acknowledged the plea and stated that he understood the consequences of the plea. When the court inquired as to whether anyone had promised defendant anything different than what was stated in the plea bargain, he replied, “No.”

Under the terms of the cooperation agreement, defendant agreed to assist the San Bernardino County Sheriff’s Department (SBCSD) and the District Attorney’s office in apprehending gang criminals. Defendant specifically agreed to provide information that would lead to the initiation of eight gang, drugs, or firearms trafficking cases, including information to apprehend individuals responsible for drive-by shootings in the Hesperia area between January and July 2015. The agreement also contemplated that defendant’s

cooperation leading to the foregoing information would take place over the course of 45 to 60 days. Under the terms of the cooperation agreement, defendant also agreed that the District Attorney's office would be the sole arbiter in determining whether his cooperation with the SBCSD complied with the terms of the agreement, and that the District Attorney's office would review the quality and quantity of the information defendant provided. Defendant affirmed that he understood the terms of the cooperation agreement, his promises, and the consequences, should he fail to perform. The cooperation agreement was signed by defendant and a SBCSD detective on December 9, 2015, and by the prosecutor on December 15, 2015. Defendant's trial counsel did not sign the cooperation agreement.

Defendant was originally ordered to reappear in court in March 2016 so the prosecutor could inform the court whether defendant had complied with the terms of the cooperation agreement and permit withdrawal of the original guilty plea. However, the parties stipulated to multiple continuances.

In January 2017, the court remanded defendant into custody and ordered a resentencing hearing for the following month, with the possibility of entertaining a motion to withdraw the guilty plea and admission.

On February 17, 2017, the court ordered the defense to file a timely motion to withdraw the plea if one was forthcoming.

On April 19, 2017, defendant filed a motion to withdraw his guilty plea, with supporting exhibits under seal. Defendant argued that he had fulfilled his part of the bargain and that the People had reneged on their commitment in honoring the agreement.

On May 5, 2017, the People filed their opposition with supporting exhibits. The People maintained that defendant provided no information concerning the Rascals gang and that the entire case against the Rascals gang was predicated on two wire taps and personal observations by law enforcement. The People also asserted that it was too late for defendant to withdraw his plea under section 1018 because defendant had already been sentenced and judgment had already been imposed.

A hearing on defendant's motion to withdraw his plea was held on July 21, 2017. At the hearing, defendant testified on his behalf. Defendant acknowledged signing the cooperation agreement and approving the clause providing for his assistance in the investigation of specific criminal cases. He also noted that his attorney did not sign the cooperation agreement. Defendant claimed that he had provided law enforcement with valuable information about the Rascals gang in early 2016, including identifying members of the gang from photos, as well as phone numbers and addresses for the gang. Some of the criminal activity intelligence he was providing concerned a methamphetamine production house, a marijuana growing operation, and a high-end car theft operation. Defendant met with Detective Quintard three times from December 2015 until January 2017 and provided him with intelligence concerning the Rascals. Whenever Detective Quintard called him on his phone, he would respond. During his



meeting with the detective, Detective Quintard never informed him that he was not complying with the agreement. In addition, when he went back to court in March 2016, the District Attorney never informed him that he was not complying with his agreement to provide intelligence concerning the gang.

Detective Quintard testified that it was defendant who had initially approached the police after his original arrest, offering to provide intelligence about the Rascals gang. As a result, Detective Quintard began talking to defendant about the gang, and the cooperation agreement was prepared. Detective Quintard went over the terms and conditions of the agreement with defendant, who appeared to understand it. However, no attorney was present at the time that the cooperation agreement was signed. Following execution of the cooperation agreement, Detective Quintard acted as defendant's "handler," and made and received phone calls to and from defendant.

After he executed the cooperation agreement, defendant did not provide the police with any information they did not already know. For example, although he identified gang members in photos, the police already knew those persons in the photos were gang members. However, if law enforcement asked defendant for confirmation, "that was just to solidify it even more." Defendant confirmed the identities of certain of those gang members, but Detective Quintard did not remember any occasion in which defendant identified an individual that police did not already know to be a gang member. In addition, defendant failed to keep in frequent contact with the police to provide information. Instead, either police reached out to him or he would call several days

before a court appearance to provide vague information that was largely useless, such as describing a vehicle that had just left a location when Detective Quintard was miles away or describing an individual sitting in a field holding on to some unspecified object. On several occasions, Detective Quintard told defendant that he needed specific, actionable information, such as an address or the identification of a gang member in a photo, or an individual driving around with guns in a stolen car, or with outstanding arrest warrants or parole violations. Detective Quintard was unable to identify a single case or arrest of any individual that was directly attributable to information provided by defendant.

Detective Quintard contacted Deputy District Attorney Dowd prior to a pending court date and told him that defendant was providing information but it was vague or already known to SBCSD. Attorney Dowd agreed to delay the court hearing date so that defendant could provide additional information. In Detective Quintard's opinion, the information provided by defendant was vague, rather than specific, and was provided "too late," because such information was already known to SBCSD. On one occasion, defendant called Detective Quintard and told him that the Rascals were "doing big things," i.e. "moving a lot of dope," but SBCSD was already aware of such information, and had observed, recorded, and videotaped the drug deals but could not inform defendant that they were on a wiretap.

The trial court initially construed the motion to withdraw the plea as a motion for specific performance of the cooperation agreement and concluded the court had the power to determine whether the contract could be enforced as defendant requested.

Following argument, the court concluded that defendant had not complied with the cooperation agreement's terms. The court noted that defendant had entered the cooperation agreement knowingly, intelligently, and "with his eyes open." As such, the court denied the motion to withdraw the guilty plea. The court thereafter remanded defendant into custody and lifted the stay on the previously imposed and executed sentence of 10 years in state prison. Defendant was awarded 257 days of credit for time served.

On September 14, 2017, defendant filed a timely notice of appeal.

### III

#### DISCUSSION

Defendant argues that he is entitled to specific performance of the cooperation agreement he signed as part of his guilty plea because he complied with the terms of that agreement. In the alternative, he asserts that he should be allowed to withdraw his guilty plea because the cooperation agreement itself was illusory, a product of mistake, unconscionably one-sided, and unfair. The People contend that the appeal should be dismissed because defendant failed to obtain a certificate of probable cause. In the alternative, the People claim that the trial court properly denied defendant's motion to withdraw his guilty plea because defendant failed to comply with the terms of the cooperation agreement.

A. *Certificate of Probable Cause*

Initially, we reject the People's claim that the appeal should be dismissed because defendant failed to obtain a certificate of probable cause. "If a defendant enters a guilty or no contest plea and fails to obtain a certificate of probable cause, the scope of an appeal is generally limited to challenging a motion to suppress evidence and raising grounds arising after entry of the plea that do not affect its validity. [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1220 (*Brown*).) A certificate of probable cause is not required where "the grounds for [a defendant's] appeal arise from the trial court's failure to give effect to the terms of [the defendant's] plea." (*Ibid.*)

Defendant's challenge is not, as the People maintain, the validity of the underlying plea agreement with its accompanying cooperation agreement and sentence, a contention that would be waived on appeal and/or would require a certificate of probable cause to challenge (see *People v. Panizzon* (1996) 13 Cal.4th 68, 84-87 [waiver of appellate rights include waiver of right to challenge a sentence contemplated by the plea]; *People v. Johnson* (2009) 47 Cal.4th 668, 678 [certificate of probable cause required if defendant's challenge "goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement"])). Rather, the gist of defendant's claim is that after he pleaded guilty, the trial court erred in failing to honor the cooperation agreement and sentence him in accordance with that agreement, and therefore, the plea agreement should be specifically enforced or defendant must be allowed to withdraw his plea. We conclude that this claim does not require a certificate of probable cause because it is based on a

“[g]round[ ] that arose after entry of the plea and do[es] not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B); see, e.g., *People v. Kaanehe* (1977) 19 Cal.3d 1, 8, 15 [holding no certificate of probable cause required to raise claim that prosecutor breached plea bargain and concluding that the defendant must be allowed to withdraw plea]; *Brown, supra*, 147 Cal.App.4th at p. 1224 [holding the defendant could pursue claim that trial court imposed a punishment more severe than that specified in her plea agreement without obtaining certificate of probable cause, and concluding that the defendant must be allowed to withdraw plea].)

#### B. *Motion to Withdraw Guilty Plea*

Defendant asserts that his plea agreement must either be specifically enforced or that he must be allowed to withdraw his guilty plea because he had fully performed to the extent possible under the cooperation agreement.

“The standard of review in cases involving ‘cooperation’ agreements depends on the issue raised. . . . [W]hether a party carried through with its part of the agreement generally is a question of fact reviewed under the substantial evidence standard.

[Citations.] [¶] However, when a cooperation agreement embraces a promise to dismiss or reduce charges, whether the promise is authorized and enforceable usually is a legal question reviewed de novo. [Citations.]” (*People v. C.S.A.* (2010) 181 Cal.App.4th 773, 777-778 (*C.S.A.*).)

“A trial court’s determination as to the appropriate remedy for breach of a cooperation agreement, i.e., dismissal of the charge or some other sanction, generally is

reviewed for abuse of discretion. [Citation.] A court abuses its discretion if it applies incorrect legal principles, as well as when its decision exceeds the bounds of reason.

[Citations.]” (C.S.A., *supra*, 181 Cal.App.4th at p. 778.)

Here, defendant’s agreement was both a plea agreement and cooperation agreement. A cooperation agreement is generally an agreement between the defendant and a law enforcement agency but is analogous to a plea agreement in a number of respects. (C.S.A., *supra*, 181 Cal.App.4th at p. 778.) “As with a plea agreement, ‘[t]he government is held to the literal terms of [a cooperation] agreement, and ordinarily must bear responsibility for any lack of clarity.’ [Citation.] And, like a plea agreement, ‘an agreement to cooperate may be analyzed in terms of contract law standards.’ [Citation.]” (*Id.* at pp. 778-779.) “Failure of the state to honor the agreement violates the defendant’s due process rights for which the defendant is entitled to some remedy. [Citation.]” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 636.)

“The Supreme Court has . . . recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the [plea] bargain by an officer of the state raises a constitutional right to some remedy.” (*People v. Mancheno* (1982) 32 Cal.3d 855, 860 (*Mancheno*), citing *Santobello v. New York* (1971) 404 U.S. 257, 262, 266-277; accord, *People v. Crandell* (2007) 40 Cal.4th 1301, 1307; *Thomas v. I.N.S.* (9th Cir. 1994) 35 F.3d 1332, 1337 [“It has long been the

law that the government's failure to keep a commitment which induces a guilty plea requires that judgment be vacated and the case remanded."].)

In remedying a breach of a plea bargain, the goal is to redress the harm caused by the violation without prejudicing either party or curtailing the trial court's sentencing discretion. (*Mancheno, supra*, 32 Cal.3d at p. 860.) "The remedy chosen will vary depending on the circumstances of each case. . . . Due process does not compel that a particular remedy be applied in all cases. [Citation.] [¶] The usual remedies . . . are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." (*Mancheno*, at pp. 860-861.)

However, "[t]his does not mean that *any* deviation from the terms of the agreement is constitutionally impermissible." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds as stated in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) "[T]he variance must be 'significant' in the context of the plea bargain as a whole to violate the defendant's rights." (*Walker*, at p. 1024.) A defendant is entitled to withdraw his or her plea when it has been "induced by misrepresentations of a

fundamental nature” such as a bargain which is beyond the power of the trial court.””  
(*People v. Hollins* (1993) 15 Cal.App.4th 567, 574.)

In this case, defendant contends the cooperation agreement was illusory, one-sided, unconscionable, and gave the District Attorney the sole and unfettered power to determine defendant’s compliance. He also asserts the cooperation agreement was voidable because the fulfillment of a material condition was impossible and it was a product of mutual mistake.

Under the terms of the cooperation agreement, if defendant’s cooperation with law enforcement effected the initiation of eight gang cases, firearm trafficking cases, and/or narcotic trafficking cases of equal or greater amounts than defendant’s case, as well as information leading to the initiation of charges in drive-by shootings in Hesperia from January to July 2015, then the prosecution would recommend a sentence less than that called for by the plea bargain. Defendant was also required to remain crime free while out of custody on the *Vargas*<sup>4</sup> waiver. The consideration for entering into the cooperation agreement was the District Attorney’s recommendation for defendant to receive a lesser sentence if defendant fulfilled his obligations under the agreement. Whether the recommendation for the lesser sentence was made to the trial court was within the control of defendant, who was tasked with fulfilling several conditions. If defendant did not fulfill those conditions, he would receive exactly what he bargained for, which was 10 years.

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<sup>4</sup> *People v. Vargas* (1990) 223 Cal.App.3d 1107.



Contrary to defendant's claim, the promise was not illusory because defendant could lawfully be resentenced "to a different period of confinement, or none at all" if he fulfilled his obligations under the cooperation agreement. "In essence, [defendant] opted for, and received, certainty in hand rather than rolling the dice with two in the bush." (*People v. Powers* (1984) 151 Cal.App.3d 905, 917, italics omitted.) Therefore, the trial court's finding defendant did not fulfill his obligations under the cooperation agreement does not affect defendant's voluntary guilty plea or the sentence, which was lawfully imposed.

Moreover, the record indicates that defendant entered into the cooperation agreement knowingly, voluntarily, freely, and intelligently. Indeed, as the trial court noted, defendant "got into this [the cooperation agreement] with his eyes open." Under the governing test, a plea or an agreement is valid "if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

Here, the record affirmatively shows that the plea, admission, and cooperation agreement were entered into voluntarily and intelligently. At the plea hearing, the trial court went through the cooperation agreement and the plea form thoroughly with defendant, asking him whether he understood his constitutional rights, whether his counsel had completely explained his legal and constitutional rights to him, and whether he waived his constitutional rights. Defendant acknowledged that he had placed his initials on the change of plea form indicating he understood his rights and the

consequences of the plea, that he did not need any more time to speak with his attorney, and that he wished to waive his constitutional rights in order to plead guilty. Defense counsel confirmed that he had personally read and explained the terms to defendant, had adequate time to discuss any issues with him, and was satisfied that he understood the terms. The court further advised defendant of the penal consequences of his plea, admission, and cooperation agreement. Defendant acknowledged the plea and cooperation agreement and stated that he understood the terms and consequences of the cooperation agreement and the plea. When the court inquired as to whether anyone had promised defendant anything different than what was stated in the plea bargain, he replied, “No.”

Furthermore, at the motion to withdraw plea hearing, defendant acknowledged signing the cooperation agreement and the clause providing for his assistance in the investigation of specific criminal cases. Although he noted that his attorney did not sign the cooperation agreement, defendant never claimed that the cooperation agreement was entered into unknowingly, was not voluntary, that the terms were too onerous to fulfill or that the cooperation agreement was unfair. Based on the record before us, we conclude that defendant’s plea, admission, and cooperation agreement were knowingly, intelligently, and voluntarily made.

Defendant also argues that the cooperation agreement included terms that were impossible to comply with. However, there was nothing impossible about what defendant was asked, and voluntarily agreed, to do. He was simply to work as a

confidential informant and provide the police with information about gang activity, including information about firearms and narcotics trafficking and a series of drive-by shootings that had occurred in Hesperia from January to July 2015. Defendant understood from the outset what was required of him, and freely and knowingly entered into the cooperation agreement. Had he found the terms of the agreement too onerous, he could have refused to sign the cooperation agreement, or alternatively negotiated for a different agreement.

The fact that the prosecutor was the sole arbiter of whether defendant met his conditions is irrelevant, given his failure to provide useful information to assist with any new criminal cases. His performance fell significantly short of what he agreed to in the cooperation agreement. After hearing evidence, including defendant's version of what he had provided to law enforcement, the trial court concluded that defendant failed to comply with the terms of the cooperation agreement. The court found that defendant was in breach of the cooperation agreement and therefore was not entitled to benefit from that agreement. The cooperation agreement called for defendant assisting with the initiation of eight gang cases, firearm and/or narcotic trafficking cases of equal or greater amounts than his current case, as well as providing information leading to the initiation of charges in drive-by shootings in Hesperia from January to July 2015. It is undisputed that defendant failed to assist in any of these cases. In addition, although defendant provided names, identified gang members in photos, and purportedly "provided information in good faith," as he claims, there was no evidence presented at the hearing to show he

provided any information of drive-by shootings in Hesperia from January to July 2015.

The trial court's conclusion that defendant did not fulfill his obligations under the cooperation agreement is supported by substantial evidence. As such, the trial court properly denied defendant's motion to withdraw his guilty plea.

#### IV

#### DISPOSITION

The judgment is affirmed.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

FIELDS  
J.